A

MASHYUR MUTIARA SDN BHD v. ABDUL SAMAT ISHAK & ORS AND ANOTHER APPEAL

HIGH COURT MALAYA, ALOR SETAR
CHAN JIT LI JC
[CIVIL APPEALS NO: 16-5-6-2017 & 16-6-6-2017]
30 JULY 2019

B

LABOUR LAW: *Employment – Termination – Appeal against award of Labour Court – Employees claimed for remuneration benefits against employer at Labour Court – Labour Court awarded in favour of employees – Whether Labour Court correct in award – Whether employee employed by employer – Whether agreement relied by employee in claim against employer valid and enforceable – Whether Labour Court seized with jurisdiction to hear employees' complaints – Whether Labour Court's quantification of awards correct – Whether employer could succeed in plea of estoppel*

C

D

LABOUR LAW: *Employment – Termination – Claim for remuneration benefits by employees against employer at Labour Court – Employees hired by entity appointed by employer – Whether there was employer-employee relationship between parties – Whether there was principal-agent relationship between employer and entity – Whether employees hired by agent – Whether entity agent/manager of employer – Whether agent had full authority and discretion to hire workers – Whether agent executed contracts of service with employees in capacity of agent/manager of employer – Whether employer employed employee – Employment Act 1955, s. 2 – Contracts Act 1950, s. 179*

E

F

LABOUR LAW: *Jurisdiction – Claim for remuneration benefits by employees against employer at Labour Court – Whether powers of Director General of Labour ('DGL') to inquire limited to disputes on wages only – Whether DGL seized with powers to inquire into employees' complaints – Employment Act 1955, s. 69(1)*

G

CONTRACT: *Employment contract – Termination – Estoppel – Termination of employees' employment – Claim for remuneration benefits by employees against employer – Allegation that employees could not take action against employers as employees rejected offer of re-employment and agreed not to take legal action against employer – Whether there was consent signed by employees not to take legal action against employer – Whether employees estopped from taking legal action against employer – Whether consent constituted restraint on employees' right to litigation – Whether consent valid and enforceable – Contracts Act 1950, s. 29*

H

The appellant, the owner of a hotel, had terminated the employment of the respondents, ('the workers'), on account of the hotel's closure. At the time of the termination, the appellant and the workers had entered into four collective agreements. This prompted the workers to file a complaint at the Labour Court against the appellant for its failure to pay them remuneration

I

benefits. The Labour Court awarded in favour of the workers. Hence, the present appeals. In support of the appeals, the appellant submitted that (i) the appellant had been wrongly sued as it was not the employer of the workers; (ii) the hotel was managed by a company known as Sheraton Overseas Management Corporation ('SOMC') and it was SOMC who should be sued as SOMC had hired the workers and executed the contracts of service with them; (iii) the execution of the contract of service, made SOMC the legal employer of the workers pursuant to s. 2(1) of the Employment Act 1955 ('Act'); (iv) the management contract executed between the appellant and the SOMC stipulated that 'The operator shall have exclusive authority in hiring, directing, supervising, discharging all hotel personnel and in determining the compensation benefits and terms of their employment' and this clearly evinced that it was SOMC, and not the appellant, who had hired the workers; (v) the fourth collective agreement, which was relied on by the workers to form the basis of their claims, was invalid as it had already expired. The validity of the fourth collective agreement was for the years 2009 and 2012 while the termination took place in 2015; (vi) pursuant to s. 69(1) of the Act, the Director General of Labour ('DGL') is empowered to inquire into disputes on wages only. In view of the workers' nature of claim, which concerned retrenchment benefits and bonuses, the DGL had no powers to inquire into their complaints; and (vii) even if the appellant was found to be the employer, there was no necessity for the appellant to make redress as (a) the workers rejected an offer of re-employment made through telephone calls; and (b) the workers agreed that they would not take any legal action against the appellant. The appellant chose not to challenge the calculation of the claims at the Labour Court. Instead, the appellant attempted to do so in the present appeal. The issues that arose for determination were: (i) whether the Labour Court erred in concluding that the respondents were the appellant's employees; (ii) whether the fourth collective agreement was valid and enforceable against the appellant; (iii) whether the Labour Court had the jurisdiction to hear the workers' complaints; (iv) whether the Labour Court's quantification of the awards was erroneous; and (v) whether the appellant could succeed in its plea of estoppel.

Held (dismissing appeals with costs):

(1) A contract of service is crucial in determining an employer-employee relationship. However, it is not necessary that the employer personally executed the contract of service. The phrase '… agent, manager or factor of such first mentioned person …', in s. 2 of the Act, clearly envisages and provides for an indirect appointment. The effect of this is that a person (entity) remains the employer even if he did not execute the contract of service as long as the party executing the contract with the worker is his duly appointed agent, manager or factor appointed. It was

A evident from the management contract that (i) SOMC was appointed by the appellant for the purpose of managing the hotel; and (ii) in the discharge of its duties, SOMC acted as the appellant's agent with full authority and discretion in the hiring of the workers. The principal and agent relationship was further encapsulated in the letters of offer, B confirmation and termination. Therefore, when SOMC executed the contracts of service, it did so as the agent and manager of the appellant. As such, by virtue of s. 2 of the Act, the appellant was the employer of the workers. The appellant, as the principal, was bound by SOMC's acts in view of s. 179 of the Contracts Act 1950 ('CA'). (paras 9 & 12-16)

C **(2)** To ascertain the validity of a collective agreement under such circumstances, it is incumbent on the court to determine whether or not the collective agreement in question contains a saving clause. In the fourth collective agreement, the saving clause appeared in art. 2 where it was stated that the agreement ' … shall remain to continue to remain D in force until 31 August 2012 and thereafter until superseded by a new collective agreement or award'. As the parties did not enter into any other collective agreements after the fourth collective agreement, and in view of the saving clause, the fourth collective agreement remained valid, enforceable and could be referred to by the workers. (paras 22 & E 24)

(3) The Labour Court exercises its jurisdiction premised on the powers of the DGL. It was erroneous to state that the DGL's powers were contained in s. 69(1) of the Act only. The DGL has been accorded additional powers by provisions subsequent to s. 69(1), namely ss. 69B F and 69C. Furthermore, the argument that the DGL's powers of inquiry are limited to a wage dispute only, and nothing else, is also flawed. The powers of the DGL, under s. 69(1)(a), (b) and (c) should be read disjunctively due to the presence of the word 'or'. The DGL, in the first instance under s. 69(1)(a) of the Act, has powers to inquire into a wage G dispute between the employer and the worker. In the exercise of this power, the DGL is bound by the definition of 'wages' as provided in s. 2 of the Act. The other limb of s. 69(1) of the Act also empowers the DGL to inquire into disputes relating to other cash payments which are not wages. However, before the DGL could exercise his powers under this limb, the DGL must satisfy himself that the cash payment H purportedly due were due from a contract of service or due under the provisions of the Act or its subsidiary legislation or due pursuant to the Wages Councils Act 1947. (paras 28-31)

(4) The Labour Court was seized with the jurisdiction to determine the disputes of the complaints in this case. A liberal interpretation was I adopted as the Act is a social legislation. If the appellant's submission, that the DGL is empowered to inquire into disputes on wages only was to be accepted, it would result in an anomaly. That is to say, a worker

who complains of non-payment of wages and other benefits could only enforce his rights in part at the Labour Court and then he has to proceed to the Industrial Court for the remainder of his claims. Alternatively, the aggrieved worker would be forced to refer his claim to the Industrial Court only when it could have been expeditiously dealt with at the Labour Court. Indirectly, the Labour Court, which is seized with the jurisdiction to hear the claim, would be ousted. The insertion of the wages definition was to serve the primary purpose of categorising the workers so as to determine which provisions of the Act was relevant to each particular group of workers. (paras 32 & 42)

(5) It was unbelievable that an establishment of the appellant's stature would actually hire, by way of re-employment, through telephone calls and without any record. There was also evidence by the workers to show that the alleged consent, that they would not take any legal action against the appellant, was not a willful consent. The workers testified that they were under duress to sign the letter as they needed the money. The Labour Court believed and accepted the explanation and the present court have not been given cause to interfere with this finding. In any event, the alleged consent was a restraint on the workers' right to litigation and was, therefore, void and unenforceable by virtue of s. 29 of the CA. The term was void and unenforceable against the workers. The appellant failed to establish its plea of estoppel. (paras 50 & 51)

(6) The appellant's challenge in this appeal was not premised on fresh evidence which was not available to it at the Labour Court's hearing. This was not permissible as, if allowed, the workers would be deprived of answering the challenge. (para 57)

Case(s) referred to:

Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

National Union Of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn Bhd [1986] 1 CLJ 474; [1986] CLJ (Rep) 193 FC ***(refd)***

National Union of Hotel, Bar And Restaurant Workers Peninsular Malaysia v. Shangri-La Hotels (Malaysia) Bhd [2017] 5 CLJ 513 FC ***(refd)***

Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor [2004] 3 CLJ 321 CA ***(refd)***

Nylex (M) Sdn Bhd v. Alias Chek [1985] 1 CLJ 185; [1985] CLJ (Rep) 602 HC ***(refd)***

Rajaretnam Palaniandy v. Amalgamated Properties & Industries [1988] 1 LNS 22 SC ***(refd)***

Securicor Malaysia Sdn Bhd Johore Bahru v. Mohd Lazi Katan [1990] 1 ILR 137 HC ***(refd)***

Uvarajah Kanasevan & Anor v. Penolong Pengarah Buruh, Butterworth & Ors [1992] 3 CLJ 1353; [1992] 1 CLJ (Rep) 348 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 29, 179
Employment Act 1955, ss. 2(1), 69(1)(a), (b), (c), 69A, 69B, 69C
Industrial Relations Act 1967, ss. 9(5), 14(1)(d)

For the appellant - Darshan Singh Aulakh; M/s Darshan & Jaswant
For the respondents - Arun Kumar S Kanesin; M/s Arun Kumar & Assocs

Reported by Najib Tamby

JUDGMENT

Chan Jit Li JC:

[1] Both these two appeals, 'Rayuan Buruh' No: 16-5-6/2017 and 'Rayuan Buruh' No: 16-6-6/2017, share a common appellant. The respondents comprise of different individuals. However, as the issues arising from the appeals are the same, the parties have by consent prayed for both the appeals to be determined together.

[2] The appellant, Mashyur Mutiara Sdn Bhd (hereinafter referred to as 'Mashyur Mutiara') was the owner of a hotel known as Sheraton Langkawi Beach Resort (hereinafter referred to as 'the hotel'.)

[3] The respondents (hereinafter referred to as 'the workers') served at the hotel in various capacities. Their employment was terminated on 5 June 2015 on account of the hotel's closure which also took place on the same date.

[4] The workers filed a complaint at the Labour Court against Mashyur Mutiara for its failure to pay them remuneration benefits. The Labour Court's awards were in favour of the workers resulting in these appeals by Mashyur Mutiara.

[5] From the submissions made by the parties, I discern that the following issues needs determination:

(i) Whether the Labour Court erred in concluding that the respondents were Mashyur Mutiara's employees.

(ii) Whether the fourth collective agreement is valid and enforceable against Mashyur Mutiara.

(iii) Whether the Labour Court had the jurisdiction to hear the workers' complaints.

(iv) Whether the Labour Court's quantification of the awards was erroneous.

(v) Whether Mashyur Mutiara can succeed in its plea of estoppel.

Whether The Labour Court Erred In Concluding That The Respondents Were Mashyur Mutiara's Employees?

[6] En Darshan Singh Aulakh (hereinafter referred to as 'En Darshan') submits that Mashyur Mutiara has been wrongly sued as Mashyur Mutiara was not at any point of time the workers' employer. He contends that Mashyur Mutiara's role was solely restricted to the construction of the physical building only. The management of the hotel including the hiring of the workers was carried out by a company called Sheraton Overseas Management Corporation (hereinafter referred to as 'SO management'). SO Management should be sued as it was the employer having both hired the workers and executed the employment contracts with them.

[7] En Darshan relies on the management contract executed between Mashyur Mutiara and SO Management in support of his submission. He submits that the said management contract expressly provided as follows:

> The operator shall have exclusive authority in hiring, directing, supervising discharging all hotel personnel and in determining the compensation benefits and terms of their employment.

This, therefore, is evidence that it was SO Management and not Mashyur Mutiara which had hired the workers.

[8] In the hiring of the workers, SO Management took the step of entering into the contract of service with the respective workers. The execution of the contract of service, En Darshan submits, makes SO Management the legal employer of the workers as s. 2(1) of the Employment Act 1955 provides as follows:

> **Interpretation**
>
> (1) In this Act, unless the context otherwise requires:
>
> 'employer' means any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person, and the word 'employ', with its grammatical variations and cognate expressions shall be construed accordingly.

[9] I agree with En Darshan that the contract of service is crucial in determining an employer-employee relationship. However, it is not necessary that the employer personally executes the contract of service. The phrase 'agent, manager or factor of such first-mentioned person' clearly envisages and provides for an indirect appointment. The effect of this is that a person (entity) remains the employer even if he did not execute the contract of service as long as the party executing the contract with the worker is his duly appointed agent, manager or factor appointed.

[10] As it was SO Management which had entered into the contract of service with the workers, it will be necessary to determine whether or not SO Management effected the execution of the contract of service as Mashyur Mutiara's agent and/or manager. The background facts of Mashyur Mutiara and SO Management are as follows.

[11] Mashyur Mutiara and SO Management had entered into a management contract on 22 October 1991. This management contract spells out clearly the rights and obligations of both Mashyur Mutiara and SO Management. The following provisions are relevant:

MASHYUR MUTIARA SDN BHD

And

SHERATON OVERSEAS MANAGEMENT CORPORATION

MANAGEMENT CONTRACT

WILKINSON & GRIST

SOLICITORS AND NOTARIES

6TH FLOOR, PRINCE'S BUILDING

CHATER ROAD

HONG KONG

0171

TABLE OF CONTENTS.

DESCRIPTION

ARTICLE 1

...

MANAGEMENT CONTRACT made and entered into this [22] day of [October], 199[1], by and between MASHYUR MUTIARA SDN. BHD, a duly organized and registered legal entity existing under the laws of the Federation of Malaysia and having its legal address at Suite 2902, 29th Floor, Menara Promet, Jalan Sultan Ismail 50250, Kuala Lumpur ("Owner"), and SHERATON OVERSEAS MANAGEMENT CORPORATION, a Delaware Corporation having its principal offices at Sixty State Street, Boston, Massachusetts 02109, U.S.A. ("Operator").

WHEREAS:

(1) Owner owns or leases and has the Legal right to the exclusive use and occupation of the site (as hereinafter defined) for the Term (as hereinafter defined) and is either in the course of constructing, furnishing and equipping, or proposes to construct, furnish and equip on the site, at its own expense, an international first-class hotel complying with Sheraton Standards (as hereinafter defined).

(2) Operator is in the business of and experienced in ownership, managing and operating, as well as planning, decorating, furnishing, equipping and promoting hotels.

(3) ...

5.01 Pre-Opening Services

Operator, **as agent** and for the account of owner, shall have the exclusive right to engage in Pre-Opening Services, which shall include, but shall not be limited to, the following:

(i) Recruiting, training, directing and employing all Hotel personnel;

(ii) ...

ARTICLE VII

AGENCY RELATIONSHIP

7.01 (i) **In the performance of its duties as the manager and operator of the Hotel Operator shall act solely as an agent of owner. Nothing herein shall constitute a partnership or a joint venture between Owner and Operator**. Except as otherwise provided herein, all obligations to third parties incurred by Operator in the course of its managing and...

(emphasis added)

[12] I am unable to produce the whole of article 7.01 as the management agreement is in the possession of Mashyur Mutiara's learned counsel who has elected not to produce the whole document. Thus, article 7.01(i) which relates to third party obligations is significantly incomplete although I believe the omitted parts would be of great assistance to the court in the determination of Mashyur Mutiara's liability. Be that as it may, it is evident from contract from what is available that SO Management was appointed by Mashyur Mutiara for the purpose of managing the hotel. It is also evident that in the discharge of its duties, SO Management acted as Mashyur Mutiara's agent. The terms also explicitly excluded any notion of a partnership and/or joint venture relationship between SO Management and Mashyur Mutiara. In the course of discharging its managerial duties of the hotel, SO Management, *albeit* an agent was given full authority and discretion in the hiring of all workers. Pursuant to Mashyur Mutiara's authorisation as contained in the management contract, SO Management did hire the workers and execute the contract of service.

[13] This principal and agent relationship is further encapsulated in the letters of offer and letters of confirmation issued to the workers. Although all the said letters were issued by SO Management, appearing in each and every letter was the following statement:

The Sheraton Langkawi Resort is owned by Mashyur Mutiara Sdn Bhd and operated by Sheraton Overseas Management Corporation as its agent.

[14] This relationship (between Mashyur Mutiara and SO Management) was admitted and affirmed by Mashyur Mutiara up to the time when the workers were terminated. The admission is contained in the following statement which appears in all the letters of termination of 5 June 2015 as follows:

A

> The Sheraton Langkawi Resort is owned by Mashyur Mutiara Sdn Bhd (Co Reg no. 210632 M) and managed by Sheraton Overseas Management Corporation as its representative.

These letters were signed by one Dato Michael Ting Sie Peng in his capacity as the then deputy managing director of Mashyur Mutiara.

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[15] It is therefore my finding that when SO Management executed the contract of service, it did so as the agent and manager of Mashyur Mutiara. As such by virtue of s. 2 of the Employment Act 1955, Mashyur Mutiara is the employer of the workers.

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[16] Having concluded that SO Management is Mashyur Mutiara's agent, Mashyur Mutiara as the principal is bound by SO Management's acts in view of s. 179 Contracts Act 1950 which reads as follows:

> Enforcement and consequences of agent's contracts.
>
> 179. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.
>
> ILLUSTRATIONS
>
> (a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.
>
> (b) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

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[17] My finding of Mashyur Mutiara's employer status is further fortified by the Minister of Human Resources' directive. In the exercise of his powers under s. 9(5) of the Industrial Relations Act 1967 (Revised 1976) the Minister had directed Mashyur Mutiara to grant recognition to the National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia with effect from 15 March 1999. A directive of this nature is only issued to an employer as reflected by the provisions contained in s. 9(5) which reads as follows:

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> Claim For Recognition
>
> 9. (1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:
>
> (a) managerial capacity;
>
> (b) executive capacity;

I

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above mentioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1C), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.

(2) Subject to subsection (1), a trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition; or

(3A) Upon according recognition to the trade union of workmen concerned under paragraph (3)(a), the employer or the trade union of employers concerned shall notify the Director General.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may, within fourteen days:

(a) of the receipt of the notification; or

(b) after the twenty-one day period in subsection (3) has lapsed,

report the matter in writing to the Director General, failing which the claim for recognition shall be deemed to have been withdrawn.

(4A) Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquiries to ascertain:

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim.

(4B) For the purposes of carrying out his functions under subsection (1B) or (4A) the Director General:

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement;

(b) may refer to the Director General of Trade Unions for him to ascertain the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and

(c) may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot.

(4C) Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; **where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer** or trade union of employers concerned, as the case may be, as from such date as the Minister may specify.

(6) A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court.

(emphasis added)

[18] Although served with the said directive some 17 years ago, Mashyur Mutiara never protested against the directive on the ground that it was not the workers' employer. On the other hand, from the fourth collective agreement which was produced in court, Mashyur Mutiara went on to execute the collective agreement with the workers' union.

[19] In view of the overwhelming evidence, I find that the Labour Court did not err in its finding that the Mashyur Mutiara was the employer of the workers when it took into consideration the following:

(a) Eksibit C3 iaitu pada surat penamatan Pengadu-pengadu dan Eksibit D2 iaitu pada surat pengesahan jawatan jelas menunjukkan bahawa Sheraton Langkawi Beach Resort dimiliki oleh Defendan.

(b) Surat "payment of final salary" bertarikh 10/07/2015 jelas menunjukkan bahawa defendan dalam mahkamah ini juga telah mengakuinya.

(c) Surat perlantikan pengadu dan pengadu-pengadu yang lain seramai 58 orang lain secara tersirat ada menyatakan bahawa pengadu-pengadu ditawarkan pekerjaan oleh defendan melalui agennya.

(d) Surat bertarikh 06/11/2000 daripada Jabatan Perhubungan Perusahaan kepada defendan menyatakan bahawa defendan telah memberikan pengiktirafan kepada Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoren Semenanjung Malaysia pada 15/03/1999. Dalam keterangan pengadu R1 ada menyatakan bahawa pengadu-pengadu adalah tergolong dalam skop keahlian kesatuan tersebut dan keterangan pengadu ada menyatakan bahawa mereka membayar yuran keahlian kesatuan sekerja melalui potongan gaji setiap bulan.

It is, therefore, my finding that it is not open to Mashyur Mutiara to deny that it is the employer.

[20] Accordingly, I find that Mashyur Mutiara has been the employer of the workers.

Whether The Fourth Collective Agreement Is Valid And Enforceable

[21] It is an undisputed fact that at the time of termination, Mashyur Mutiara and the workers had already entered into four collective agreements. The workers rely on the fourth collective agreement as the basis of their claims. En Darshan submits that the workers cannot be allowed to do so as the said collective agreement was invalid as it had already expired. The validity of the fourth collective agreement was for the years 2009 to 2012. However, the termination had taken place in 2015.

[22] It is trite that in order to ascertain the validity of a collective agreement under such circumstances it is incumbent on the court to determine whether or not the collective agreement in question contains a saving clause. The Federal Court in *National Union Of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn Bhd* [1986] 1 CLJ 474; [1986] CLJ (Rep) 193 speaking through Mohd Azmi SCJ held (at p. 200):

> Reading the plain meaning of the words within the four corners of the 1975 collective agreement, I entirely agree with the conclusion of Razak J on the interpretation of Article 1(b). As indicated by the learned Judge, if the parties had intended that notwithstanding termination, the

terms of the agreement would nevertheless continue to have effect until such time as the 1975 collective agreement is replaced by a new agreement, then nothing would be more simpler than by providing a saving clause to that effect in the 1975 agreement. There is no such continuing clause or saving clause in the collective agreement.

[23] On considering the fourth collective agreement, I find that a saving clause appears in article 2 and it reads as follows:

> Clause (a) This agreement shall be deemed to have come into force on 1st September 2009 and shall continue to remain in force until 31st August 2012 **and thereafter until superseded by a new collective agreement or award**.
>
> Clause (b) ...
>
> Clause (c) This agreement may be terminated by either party by serving three (3) months notice in writing of its intention to negotiate for a new agreement but no such notice shall be given before 1st June 2012. Negotiations shall commence not later than one (1) month from the date of receipt of such notice. In the event that this Agreement is terminated or of a deadlock in negotiation, the provisions of the current terms and conditions of employment shall prevail until superseded by new terms concluded between the parties or awarded by the Industrial Court.
>
> Clause (d) ...
>
> (emphasis added)

[24] As the parties did not enter into any other collective agreements after the fourth collective agreement and in view of the saving clause, I am of the view the fourth collective agreement remains valid and is enforceable. Accordingly, the workers can rely on this collective agreement.

Whether The Labour Court Has The Jurisdiction To Hear The Parties' Dispute

[25] In considering En Darshan's submissions on this issue, I find that it is necessary to consider the following sub-issues:

(i) Whether s. 69(1) of the Employment Act 1955 permits the Labour Court to determine a claim of this nature; and

(ii) Whether the workers are contractually estopped from referring the dispute to the Labour Court.

Whether s. 69(1) Of The Employment Act Permits The Labour Court To Determine A Claim Of This Nature

[26] The Labour Court exercises its jurisdiction premised on the powers of the Director General of Labour (hereinafter referred to as 'Director General'). Hence, there is a need to determine the extent of the Director General's powers of inquiry.

[27] En Darshan submits that as the powers of the Director General are contained in s. 69(1) of the Employment Act 1955 only. He contends that a reading of s. 69(1) will show that the Director General is empowered to inquire into disputes on wages only. The instant appeals relate to retrenchment benefits and bonuses. These claims are not wages and have been specifically excluded by s. 2 of the Act which provides as follows:

> 2. Interpretation.
>
> (1) In this Act, unless the context otherwise requires:
>
> ...
>
> "wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include:
>
> (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
>
> (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;
>
> (c) any travelling allowance or the value of any travelling concession;
>
> (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
>
> (e) any gratuity payable on discharge or retirement; or
>
> (f) any annual bonus or any part of any annual bonus;
>
> ...

In view of the workers' nature of claim, the Director General has no powers to inquire into their complaints.

[28] With the greatest of respect, I find this submission flawed on two major aspects. It is erroneous to state that the Director General's powers are contained in s. 69(1) only. The Director General has been accorded additional powers by provisions subsequent to s. 69(1). They are s. 69B and s. 69C of the Employment Act 1955. Section 69B provides as follows:

> Additional powers of Director General to inquire into complaints
>
> 69B. (1) Notwithstanding the provisions of this Act, the powers of the Director General under paragraph 69(1)(a) shall extend to employees whose wages per month exceed two thousand ringgit but does not exceed five thousand ringgit.
>
> (2) For the purposes of this section, the term "wages" means wages as defined in section 2 but does not include any payment by way of commission, subsistence allowance or overtime payment.

A (3) Save for Parts XV and XVI which shall apply with the necessary modifications, the other provisions of this Act shall not apply to the employees referred to in subsection (1).

And s. 69C provides as follows:

Claims for indemnity for termination of contract without notice

B

69C. (1) In the exercise of his powers under subsection 69B(1), the Director General may inquire into and decide any claim concerning any indemnity due to the employer or employee where the contract of service is terminated by either party without notice, or if notice was given, without waiting for the expiry of that notice.

C

(2) The indemnity due to the employer or employee under subsection (1) shall be a sum equal to the amount of wages which would have accrued to the employee during the term of the notice or during the unexpired term of the notice.

D **[29]** The argument that the Director General's powers of inquiry are limited to a wage dispute only and nothing else is also flawed. Section 69(1) of the Employment Act 1955 provides as follows:

Director General's power to inquire into complaints.

69. (1) The Director General may inquire into and decide any dispute
E between an employee and his employer in respect of wages or any other payments in cash due to such employee under:

(a) any term of the contract of service between such employee and his employer;

(b) any of the provisions of this Act or any subsidiary legislation made
F thereunder; or

(c) the provisions of the Wages Council Act, 1947 or any order made thereunder,

and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems
G just without limitation of the amount thereof.

(2) The powers of the Director General under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Part, any claim by:

H (i) an employee against any person liable under section 33;

(ii) a contractor for labour against a contractor or sub-contractor for any sum which the contractor for labour claims to be due to him in respect of any labour provided by him under his contract with the contractor or sub-contractor; or

I (iii) an employer against his employee in respect of indemnity due to such employer under subsection 13(1),

and to make such consequential orders as may be necessary to give effect to his decision.

(3) In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under subsection 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:

Provided that if the decision of the employer under paragraph 14(1)(a) is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity *in lieu* of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:

Provided further that the Director General shall not set aside any decision made by an employer under paragraph 14(1)(c) if such decision has not resulted in any loss in wages or other payments payable to the employee under his contract of service:

And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within sixty days from the date on which the decision under section 14 is communicated to him either orally or in writing by his employer.

(3A) An order made by the Director General for the payment of money under this section shall carry interest at the rate of eight per centum per annum, or at such other rate not exceeding eight per centum per annum as the Director General may direct, the interest to be calculated commencing on the thirty-first day from the date of the making of the order until the day the order is satisfied:

Provided that the Director General, on an application by an employer made within thirty days from the date of the making of the order, if he is satisfied that special circumstances exist, may determine any other date from which the interest is to be calculated.

(4) A person who fails to comply with any decision or order of the Director General made under this section commits an offence and shall be liable, on conviction, to a fine not exceeding ten thousand ringgit; and shall also, in the case of a continuing offence, be liable to a daily fine not exceeding one hundred ringgit for each day the offence continues after conviction.

(emphasis added)

[30] The powers of the Director General under s. 69(1)(a), (b) and (c) of the Employment Act 1955 should be read disjunctively due to the presence of the word 'or'. I am of the view that these provisions provides for the following circumstances. The Director General in the first instance under

s. 69(1)(a) has powers to inquire into a wage dispute between the employer and the worker. In the exercise of this power the Director General is bound by the definition of 'wages' as provided in s. 2.

[31] The other limb of s. 69(1) of the Employment Act 1955 also empowers the Director General to inquire into disputes relating to other cash payments which are not wages. However, before the Director General can exercise his powers under this limb, the Director General must satisfy himself that the cash payments purportedly due are due from a contract of service or due under the provisions of the Employment Act 1955 or its subsidiary legislation or due pursuant to the Wages Councils Act 1947 (or any order made thereunder.)

[32] I have elected to adopt a liberal interpretation as the Employment Act 1955 is a social legislation. In addition to that if En Darshan's submission was to be accepted, it would result in an anomaly. That is to say a worker who complains of non-payment of wages and other benefits can only enforce his rights in part at the Labour Court and then he has to proceed to the Industrial Court for the remainder of his claims. Alternatively, the aggrieved worker would be forced to refer his claim to the Industrial Court only when it could have been expeditiously dealt with at the Labour Court . Indirectly, the Labour Court which is seized with jurisdiction to hear the claim would be ousted. I also minded to believe that the insertion of the wages definition was to serve the primary purpose of categorising the workers so as to determine which provisions of the Act were relevant to each particular group of workers.

[33] In the determination of this issue, it is relevant to bear in mind the difference between a contract of service and the terms of employment. Section 2 of the Employment Act 1955 defines a contract of service as follows:

> "contract of service" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract;

I am of the view that the elements of a contract of service within the confines of s. 2 were satisfied when Mashyur Mutiara through SO Management issued the letters of offer of employment to the workers and when the offer of employment for their respective designated posts was accepted by the workers who in fact did work at the hotel.

[34] A distinction must be made between the contract of service as against the terms of employment. This distinction was considered by the Federal Court in *Uvarajah Kanasevan & Anor v. Penolong Pengarah Buruh, Butterworth & Ors* [1992] 3 CLJ 1353; [1992] 1 CLJ (Rep) 348 where Harun Hashim SCJ held (at pp. 352-354):

Section 2 of the Employment Act provides:

'contract of service' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

The terms of employment, however, is a separate and distinct agreement which may be expressed in a collective agreement, company regulations or implied by law.

Section 17 of the Industrial Relations Act provides:

(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on:

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

(2) As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the **rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement** unless varied by a subsequent agreement or a decision of the Court.

(emphasis added)

C.P. Mills in his book "*Industrial Disputes Law in Malaysia*" 2nd Edn. puts it thus at p. 55:

> A collective agreement becomes binding on the individual workman only because the terms of the agreement are made implied terms in the **individual contract**.
>
> The collective agreement and the individual contract, as was said in *Len Seng* "must and can co-exist" together. However, the rates of wages to be paid and the conditions of employment to be observed under the individual contract "shall be in accordance with" the collective agreement unless varied by a subsequent collective agreement or decision of the Court.

We are in entire agreement with the comments of the learned author. A contract of service is an agreement between an individual employee and his employer whereas a collective agreement is:

> an agreement in writing concluded between an employer or a trade union of employers of the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties:

A as defined by s. 2 of the Industrial Relations Act. The final distinction is this : the right to claim wages arises under the contract of service but how much is to be paid is determined by the collective agreement.

[35] In the instant case, the terms of employment were not provided for in the letters of offer. They were placed in the collective agreements and in this B case, the fourth collective agreement. In *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517. Zulkefli Makinudin J (as he then was) held (at p. 530)

> The order of recognition made under s. 9 of the Act would result in a trade union contracting on behalf of its members employed by the C appellant for new or different terms and conditions of employment. This takes place in the form of collective bargaining. The expression "collective bargaining" is defined in s. 2 of the said Act as negotiating with a view to the conclusion of a collective agreement, whilst "collective agreement" means an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on D the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties. This will clearly indicate that once a trade union of employees is accorded recognition, it contracts on behalf of all employees within its scope of representation. The order of recognition would have the effect of taking away the individual rights of non-union members and future employees to contract E and to bargain on their terms and conditions of employment. The contracting rights are, therefore, transferred from the employees to the trade union. The collective agreement will subsequently bind all employees who fall within the scope of representation of the trade union irrespective of whether they are members or not.

F (see also: *National Union of Hotel, Bar And Restaurant Workers Peninsular Malaysia v. Shangri-La Hotels (Malaysia) Bhd* [2017] 5 CLJ 513; [2017] 2 ILR 433)

[36] I see no cause to depart from this statement of the law. As such I am of the view that the fourth collective agreement must be read in conjunction G with the contract of service as the terms of employment were contained therein. Thus, the workers' claim for retrenchment benefits and bonus constitute cash payments payable under a contract of service. Consequentially it follows that the Director General has the powers to inquire into today's claims.

H **[37]** There is, however, a limitation to the exercise of these powers. The limitation is contained in s. 69A of the Employment Act 1955 which provides as follows:

> Limitation on power conferred by s. 69
>
> I 69A. Notwithstanding section 69, the Director General shall not inquire into, hear, decide or make any order in respect of any claim, dispute or purported dispute which, in accordance with the Industrial Relations Act 1967:

(a) is pending in any inquiry or proceedings under that Act;

(b) has been decided upon by the Minister under subsection 20(3) of that Act; or

(c) has been referred to, or is pending in any proceedings before, the Industrial Court.

[38] *Uvarajah* (*supra*) is instructive on the powers and limitation of the Director General. The Supreme Court speaking through Harun Hashim SCJ held (at pp. 354-355)

> The Industrial Court has the power under s. 33 of the Industrial Relations Act to interpret any collective agreement; and the power to order any party to comply with any terms of a collective agreement under s. 56 of the Industrial Relations Act, but the jurisdiction conferred on the Industrial Court under these two sections has not been made to the exclusion of any other Court or tribunal. If the legislature had intended it to be otherwise, it would have said so expressly as it does e.g. in Article 128 of the Federal Constitution: "The Supreme Court shall, to the exclusion of any other Court, have jurisdiction ...".
>
> Again s. 69A of the Employment Act provides:
>
> > Notwithstanding s. 69, the Director General shall not inquire into, hear, decide or make any order in respect of any claim, dispute or purported dispute which, in accordance with the Industrial Relations Act 1967:
> >
> > (a) has been referred to, or is pending in any proceedings, before, the Industrial Court; or
> >
> > (b) is pending in any inquiry or any proceedings under this Act.
>
> which clearly illustrates that the jurisdiction of the Director General of Labour under s. 69 has not been excluded merely because the wages of a complaining employee are provided for in a collective agreement. Indeed, the Director General under s. 69 must necessarily interpret and enforce the terms of the collective agreement when deciding on a complaint and making an order thereunder. What s. 69A seeks to do is to avoid duplicity of proceedings. By the same token we hold that the only exclusion of the Director General's power under s. 69 *vis-a-vis* the Industrial Court is if the claim or dispute has been referred to or pending before the Industrial Court. It follows that the decision in *Securicor Malaysia* is wrong in law.

(see also *Neoh Choo Ee & Co Sdn Bhd v. Vasalamany Govindasamy & Anor* [2004] 3 CLJ 321.)

[39] Incidentally, *Uvarajah* (*supra*) overruled *Nylex (M) Sdn Bhd v. Alias Chek* [1985] 1 CLJ 185; [1985] CLJ (Rep) 602, *Rajaretnam Palaniandy v. Amalgamated Properties & Industries* [1988] 1 LNS 22 and *Securicor Malaysia Sdn Bhd Johore Bahru v. Mohd Lazi Katan* [1990] 1 ILR 137 which En Darshan had relied on in support of his submission.

[40] As Mashyur Mutiara does not seek to rely on the limitation under s. 69A of the Employment Act 1955, it is my finding that the nature of the workers' claim in no way ousts the jurisdiction of the Labour Court to hear the complaints.

Whether The Workers Are Contractually Estopped From Referring The Dispute To The Labour Court

[41] En Darshan submits that the workers are estopped from referring the complaints to the Labour Court by virtue of article 4 of the fourth collective agreement. Article 4 reads as follows:

ARTICLE 4 SETTLEMENT OF DISPUTE

Clause (a) Recognising the value and the importance of the full discussion in clearing up misunderstanding and every reasonable effort to preserve harmony, the Hotel and the Union shall dispose of any complaint from the employee at the lowest possible level.

Clause (b) The following procedure shall be followed in dealing with any complaint save interpretation, variation or of non-compliance with this Agreement.

Stage 1 Any employee alleging that he has any complaint may immediately lodge it with his immediate Superior or Department Head.

Stage 2 If within three (3) working days, no solution has been resolved to the satisfaction of both parties, the matter shall be referred to the Director of Human Resources and the employee shall be represented by the House Committee.

Stage 3 If within five (5) working days, no solution has been resolved with the Director of Human Resources, the Union and its Branch shall step in together with the House Committee and the employee concerned to resolve the matter with the General Manager.

Stage 4 If no solution results within fourteen (14) working days the matter may then be referred to the Department of Industrial Relations, Ministry of Human Resources for conciliation or mediation.

(emphasis added)

[42] En Darshan submits that it is evident from article 4 that the parties contracted to refer all matters to the Industrial Court. This is reflected in how the stages of the referral had been meticulously set out. En Darshan submits that once a dispute arises there should be in-house attempts at settlement. In

the event that the said dispute cannot be settled, the matter must be referred to the department of industrial relations. Upon the referral, s. 14(1)(d) of the Industrial Relations Act 1967 applies and the Labour Court will be ousted.

[43] I do not propose to deal with learned counsel's argument in detail as I am of the view that it has no merit. Clause (b) of article 4 is clear. It excludes the procedure which En Darshan referred to in matters which relate to non-compliance of the collective agreement and that is exactly the workers' complain today. Hence, it is my finding that art. 4 does not estop the workers from lodging their complain at the Labour Court .

[44] In the final analysis I find that the Labour Court was seized with the jurisdiction to determine the disputes in these complaints.

Whether Mashyur Mutiara Can Succeed On Its Plea Of Estoppel

[45] En Darshan submits that even if Mashyur Mutiara is found to be the employer, there is no necessity for Mashyur Mutiara to make redress as (i) the workers rejected an offer of re-employment and (ii) the workers had agreed that they will not take any legal action against Mashyur Mutiara.

[46] The workers deny that there was an offer of re-employment. One Peter Anak Athan who identified himself as the group manager of Century Hotel & Resort. He was in the employer of Mashyur Mutiara testified that there was an offer of re-employment and the offers were made through telephone calls. His evidence appears as follows:

S : Ada sebarang surat tawaran kerja kepada pekerja?

J : Tiada, HR ada hubungi untuk tawaran kerja.

S : Ada hubungi pengadu-pengadu untuk tawaran kerja?

J : Ada, tapi pengadu cakap tidak mahu.

[47] I find it unbelievable that an establishment of such stature will actually hire (by way of re-employment) through telephone calls and without any record. And, En Peter's oral evidence runs contrary to the termination letter issued by Mashyur Mutiara which appears as follows:

SHERATON LANGKAWI BEACH RESORT
Teluk Nibong, Langkawi 07000
Kedah, Malaysia

05th June 2015

Abdul Samat Bin Ishak
Bell Captain
Sheraton Langkawi Beach Resort
Teluk Nibong
07000 Pulau Langkawi
Kedah

Dear Abdul Samat

A Re : TERMINATION OF SERVICES WITH SHERATON LANGKAWI RESORT

Refer to the above subject matter.

As you are well aware of, our Sheraton Management Agreement had been duly terminated effectively from 1st June 2015. It is an inevitably
B saddest moment and great loss for us as most of you have started with the Sheraton since the opening of the resort until to-date.

Regrettably, we have to come to a stage for a drastic action to be taken as our business has been substantially declining which our revenue does not justify us to maintain the said management agreement as well as
C staffs.

We wish to notify you that the resort will be closed by July 5, 2015 to make way for new owner to come and do the necessary. A new management has been and/or shall be taking over the entire operation of this resort.

D In the light of the above, we are constrained to serve you with one (1) month notice to enable you to look for other employment opportunities elsewhere or we can assist you to find a job.

Thank you for being a part of our Team and we wish you all the best in your future endeavours.

E Thank you.

Yours faithfully

T.t

DATO MICHAEL TING SIE PING

F

[48] The letter was given a month before termination to enable the workers find alternative employment. And, Mashyur Mutiara did not show how it assisted the workers in securing a new job.

[49] En Darshan's other argument is that there was an agreement by the
G workers not to take legal action on Mashyur Mutiara over the termination. The alleged agreement appears in the following letter:

10th July, 2015

Name : Abdul Samat Bin Ishak

H IC No : 650126-02-5129

Employment ID No : 3036

Position : Bell Captain

Dear Sir/ Madam

I PAYMENT OF FINAL SALARY

Mashyur Mutiara Sdn. Bhd. being the owner of the property has made a final calculation of salary, balance leave and service charge on behalf of the management company which is Starwood Asia Pacific Pte Ltd (Sheraton).

You will be paid the final month's salary which is as follows:

No	Type of Payment	RM
1	Salary for the month of June 2015	1677.00
2	Balance leave entitlement for 2015	903.00
3	Service Charge + Public Holiday	541.65
4	Other	322.50
5	Deduction Other	-544.95
	Total Payable	2899.20

Upon receipt of this final salary (RM2899.20), you shall have no further claim against the owner Mashyur Mutiara Sdn. Bhd. and Starwood Asia Pacific Pte. Ltd. (Sheraton).

Kindly acknowledge your agreement by signing below and upon receipt of the consideration above, you have agreed that you shall not pursue any further legal actions and/or to lodge complaints against the owner Mashyur Mutiara Sdn. Bhd. and Starwood/Sheraton, failing which shall entitled either or both the Owner and Management Company to take legal action against yourselves for breach of this agreement together with all the expenses incurred for initiating the said Suit.

Signed by Owner	Witnesses by:
Mashyur Mutiara Sdn Bhd	Lawyer
...	...
Director	Name
Agreed by: Employee	Witnesses by:
T.t	T.t
...	...
Name : ABDUL SAMAT B. ISHAK NRIC : 650126-02-5129	Name : PETER ATHAN NRIC : 690807-13-5223

[50] There was evidence by the workers to show that the alleged consent was not a willful consent. The workers testified that they were under duress to sign the said letter as they needed the money. The Labour Court believed and accepted the explanation and I have not been given cause to interfere with this finding. In any event, I find the alleged consent a restraint on the workers' right to litigation. It is, therefore, void and unenforceable by virtue of s. 29 of the Contracts Act 1950 which provides as follows:

Agreements in restraint of legal proceedings void.

29. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise

Exception 1 - This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.

Saving of contract to refer questions that have already arisen

Exception 2 - Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any law as to references to arbitration.

Exception 3 - Nor shall this section render illegal any contract in writing between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall be final and conclusive and shall not be questioned by any court.

In this exception, the expression "scholarship" includes any bursary to be awarded or tuition or examination fees to be defrayed by the Government and the expression "Government" includes the Government of a State.

[51] In view of this, I find the terms void and unenforceable against the workers. With this finding, I conclude that Mashyur Mutiara has failed to establish its plea of estoppel.

[52] I now turn to the issue of quantum.

Quantum

[53] After considering the terms of the fourth collective agreement, I find that the awards are premised on the provisions of the said collective agreement. The bonus for 2014 is payable pursuant to article 11(a) which reads as follows:

ARTICLE 11 ANNUAL BONUS

Clause (a) The Hotel shall pay each and every employee at the end of each calendar year, an annual bonus as follows:

(i) An employee who is in service with the Hotel for one (1) year or more shall be entitled to one (1) month last drawn basic salary based on monthly average of total basic salary of twelve (12) months period (January - December).

(ii) An employee who is in service with the Hotel for less than one (1) year, shall be entitle to a pro-rata basis based on monthly average of period served.

(iii) An employee who retires, or is medically boarded out shall be entitle to a pro-data basis of one (1) month, based on monthly average of total basic salary over a period of service.

(iv) The above shall not in any way preclude the Hotel from declaring a higher bonus of more than one (1) month at the Hotel's sole discretion.

[54] The bonus for 2015 is payable pursuant to article 11 which reads as follows:

ARTICLE 11 ANNUAL BONUS

Clause (a) The Hotel shall pay each and every employee at the end of each calendar year, an annual bonus as follows:

(v) An employee who is in service with the Hotel for one (1) year or more shall be entitled to one (1) month last drawn basic salary based on monthly average of total basic salary of twelve (12) months period (January - December).

(vi) An employee who is in service with the Hotel for less than one (1) year, shall be entitle to a pro-rata basis based on monthly average of period served.

(vii) An employee who retires, or is medically boarded out shall be entitle to a pro-data basis of one (1) month, based on monthly average of total basic salary over a period of service.

(viii) The above shall not in anyway preclude the Hotel from declaring a higher bonus of more than one (1) month at the Hotel's sole discretion.

[55] Service charge is payable under article 12 and reads as follows:

ARTICLE 12 SERVICE CHARGE

Clause (a) The Hotel shall retain 10% of the 100% service charge imposed on all bills monthly. The remaining 90% service charge shall be fully distributed to all employees covered within the Scope of this Agreement as listed in Appendix B, except part-timers, temporary, casual and retired employees.

Clause (b) The Hotel shall furnish to the Union Head Office not later than the tenth (10th) working days of the following month, a copy of the monthly statement of accounts of the service charge of the preceding month and to extend the same to the House Committee and Langkawi Branch as follows:

(i) The total service charge for each outlet;

(ii) The grand total service charge;

(iii) The total number of service charge points of the employees;

(iv) The total number of service charge points increased or decreased;

(v) The value of service charge per point;

(vi) The names, designation, department, date of employment and individual service charge point together with the individual value.

A Clause (c) The Union shall have every right to check and inspect all accounting books, bills, documents or accounts relating to the 10% service charge on serving ten (10) working days written notice.

Clause (d) The service charge points shall on no circumstances whatsoever be deductible when an employee is on any type of paid leave.

B

Mashyur Mutiara also took into consideration the service charge when it calculated the last salary paid to the workers. This is reflected in Mashyur Mutiara's letter enclosing the payment of final salary as reproduced at C para. 49.

[56] The severance pay is payable pursuant to article 43 which reads as follows:

ARTICLE 43 SEVERANCE PAY

D Clause (a) (i) In the event of the closure of the Hotel, an employee whose service is terminated shall be entitled to severance pay as follows:

Years of Service	Wages for each year service
(i) Less than two (2)	15 days
(ii) Two (2) or more but less than five (5)	20 days
(iii) Five (5) or more	25 days

E

An incomplete year shall be calculated as a completed year of service.

F Clause (b) The Hotel shall give written notice of closure to employee not later than two (2) months or wages *in lieu* of notice before the date on which his employment is to be terminated.

[57] Mashyur Mutiara chose not to challenge the calculation of the claims G at the Labour Court . However, in this appeal Mashyur Mutiara attempts to do so. The challenge is not premised on fresh evidence which was not available to it (Mashyur Mutiara) at the Labour Court hearing. This is not permissible as, if allowed, the workers would be deprived of answering the challenge. (*Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy* [2016] H 8 CLJ 293 (FC) followed.)

[58] Having considered the submissions of both parties and the appeal record, I find that this appeal should be dismissed with costs of RM5,000. I had also considered the other issues raised by learned counsel for the appellant. It suffices to say that those issues cannot in any way alter my I finding that there is no merit in these appeals.